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No. 209

In the Supreme Court of the United States

OCTOBER TERM, 1950

FISHER MOTORS CORPORATION AND U. S. ACCEPTANCE CORPORATION, PETITIONERS

v.

GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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The Government is submitting this memorandum in support of the application for certiorari because the decision below raises issues of large public importance in the effective enforcement of the antitrust laws. Directly involved is the question, hitherto unpresented to this Court, of the precise scope to be given Section 5 of the Clayton Act (38 Stat. 731, 15 U. S. C. 16). That provision was enacted by Congress as a corollary to Section 4, which authorizes private parties in-

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jured by antitrust violations to recover treble damages. Congress recognized that the prosecution of an antitrust suit involves many complex burdens, of both a legal and practical character, which might discourage private suitors from availing themselves of the remedy afforded by Section 4. Accordingly, it undertook by Section 5 to remove at least some of these burdens in those cases where the Government had already successfully concluded an antitrust prosecution against the defendant. Section 5 provides:

> a final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto * * *.

In the present case, petitioners brought this action under Section 4 to recover treble damages for injuries allegedly sustained as a result of respondents' violation of Section 1 of the Sherman Act, of which they previously had been convicted. *United States* v. *General Motors Corporation*, 121 F. 2d 376 (C. A. 7), certiorari denied, 314 U. S. 618, 710. The complaint set

forth the conspiracy by which petitioners had been injured in terms identical to the indictment in the criminal prosecution. Petitioners sought to prove the conspiracy by proof of the criminal conviction, in support of which they introduced into evidence the indictment in the previous case. In addition, they introduced corroborative testimony by witnesses. Respondents objected to the introduction of the indictment as evidence, and to the instructions to the jury regarding the evidentiary effect of the prior conviction. A verdict was awarded and judgment entered in favor of the petitioners. On appeal to the Court of Appeals for the Seventh Circuit, this judgment was reversed and the cause remanded on the ground, among others, that the trial court erred in permitting the jury to consider the indictment itself as evidence in the case (181 F. 2d 70).

The Court of Appeals held that the petitioners were entitled to rely upon the prior criminal judgment "as prima facie evidence that defendants had been guilty of a conspiracy to restrain dealers' interstate trade and commerce in General Motors cars for the purpose of monopolizing the financing essential to the movement of those cars", and that the judgment was "available at least for the limited purpose of establishing that there had been a violation of public rights in the absence of which plaintiffs would have no cause of action under the statute, and from which violation they assert their injury stemmed" (R.

9454). The court held, however, that the indictment was inadmissible in evidence, on the theory that, since it charged a number of restraints, proof of no particular one of which was necessary to the finding of guilt, the indictment did not constitute evidence of any particular restraint. The court also stated that the evidence upon which the criminal judgment rested was wholly immaterial and irrelevant in the civil case.

The practical effect of the lower court's interpretation is to reduce the evidentiary value of Section 5 to a useless skeleton. The construction made by the Court of Appeals frustrates the purpose of Congress in enacting this provision as a means for minimizing the burdens which would otherwise rest upon private suitors. The judgment of guilty, standing alone, merely establishes that defendants conspired in restraint of interstate trade with respect to monopolizing automobile financing—an abstract crime, the proof of which is of little value to a plaintiff seeking to show that he was injured by specific actions taken by the conspirators in furtherance of their illicit purposes. The jury in the criminal case passed upon the particular conspiracy described in the indictment and proved by the supporting evidence, not upon the bare bones of a violation of Section 1 of the Sherman Act defined in abstract, general terms. The verdict of "guilty" in and of itself would not give the civil jury any information as to the content of the

crime for which the defendants were convicted. If Section 5 is to be given any real significance in facilitating proof of the criminal conspiracy in the civil case, the trial court in the latter proceeding must go beyond the naked formal judgment, and recreate and define, for presentation to the jury, the concrete scope of the criminal conspiracy to which the defendants were parties and the actual issues settled by the criminal conviction. In seeking to reconstruct this holding for the benefit of the civil jury, the trial judge, it is submitted, should review the pleadings, evidence, and charge in the criminal case, to such extent as is necessary, and present to the civil jury, by appropriate instructions and excerpts from the criminal record, a clear and accurate picture of what was actually litigated and determined in the prior proceeding.

Since the indictment is or may be descriptive of the conspiratorial actions of which the defendants were convicted, admission of the indictment, under appropriate instructions by the court as to its precise legal significance, would appear to be a permissible means for carrying out the purposes of Section 5. The construction by the court below, however, requires the trial judge in the civil suit to treat the indictment and the evidence in the criminal case as wholly irrelevant in defining the conspiracy of which defendants were convicted. This places an unduly restricted interpretation upon Section 5. In addition, the

ruling below conflicts, at least in principle, with *Eastman Kodak* v. *Southern Photo Material Co.*, 295 Fed. 98 (C. A. 5), affirmed on other grounds, 273 U. S. 359, which approved the admission in evidence in a treble damage action of the complaint, answers, and decree in a prior Government civil antitrust suit.

While the Government endeavors vigorously to enforce the antitrust laws under the remedies granted to it, treble damage suits by injured private parties are an important factor in bringing about obedience to the statute. The construction of Section 5 adopted by the court below, within its circuit and elsewhere if followed as a precedent, would make it very difficult for private parties injured by a criminal antitrust conspiracy to obtain redress, particularly in cases involving widespread and complex conspiracies. The practical effect of the decision below is to nullify the benefits which Section 5 was intended to confer upon private suitors, and to require them to retry, in substance if not in form, the issue of conspiracy previously resolved against the defendants.

For the reasons stated, it is respectfully submitted that the petition for certiorari raises questions of substantial importance warranting review by this Court.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1950.

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